92-1602

No. _____

Supreme
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OFFICE

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

WALTER E. BREWER AND BRIAN E. HONEL

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Victim Witness Protection Act, 18 U.S.C. §§ 3663-3664 ("VWPA"), authorizes a federal court to order a defendant to pay restitution for all losses caused by the conspiracy rather than just those losses caused by the specific conduct the defendant performed in furtherance of the conspiracy.

2. Whether the petitioners were deprived of due process when the district court entered and the court of appeals affirmed a restitution order which was based on hearsay information which did not have even a minimum indicia of reliability.

3. Whether the petitioners were deprived of due process when the district court entered and the court of appeals affirmed a restitution order which was based on unreliable, incomplete and inaccurate information.

4. Whether the petitioners were deprived of due process when the district court entered and the court of appeals affirmed a restitution order which did not limit the amount of restitution to the losses which were caused by the specific conduct which was the basis of the offense for which they were convicted.

PARTIES TO THE PROCEEDING

Respondent United States of America (the "Government") instituted this action in the United States District Court for the Northern District of Oklahoma against Petitioners Walter E. Brewer ("Brewer") and Brian E. Honel ("Honel") and Defendants Fred G. Latham, Jr., Wayman C. Watkins, Jerry W. Morgan, Jeffrey A. Scott, Joseph A. Wilburn, Donald J. Elder, Jr. and Sheri G. Scott.

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REFERENCE TO OPINIONS RENDERED BY COURTS BELOW

The judgments and sentences against Brewer in Case No. 90-CR-087-007-E and against Honel in Case No. 90-CR-087-004-E in the United States District Court for the Northern District of Oklahoma are not reported. See Appendices A and B. The judgments of the United States Court of Appeals for the Tenth Circuit affirming the district court's restitution orders against Brewer and Honel in consolidated Case Nos. 92-5038 and 92-5043 are not reported. See Appendices C and D. The court of appeals' opinion affirming the district court's restitution orders against Brewer and Honel is reported at 983 F.2d 181 (10th Cir. 1993). A copy of that opinion is attached as Appendix E.

JURISDICTIONAL STATEMENT

The district court's judgments and sentences against Brewer and Honel were entered on February 11, 1992, filed on February 13, 1992, and docketed on February 14, 1992. The court of appeals' judgment and opinion affirming those judgments and sentences were entered and filed on January 5, 1993.

This Court has jurisdiction of Brewer's and Honel's petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The VWPA, 18 U.S.C. §§ 3663 and 3664:

§ 3663. Order of restitution

(a) (1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant --

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense --

(A) return the property to the owner of the property or someone designated by the owner, or

(B) if return of the property under subparagraph (A) is impossible,

impractical, or inadequate, pay an amount equal to the greater of --

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim --

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e) (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in --

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f) (1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than --

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or

supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced --

(1) by the United States --

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

§ 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the

amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under

this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

STATEMENT OF THE CASE

The government initiated this action by filing an indictment on August 9, 1990 in the United States District Court for the Northern District of Oklahoma charging Brewer and Honel, among others, with one count of conspiracy to commit mail fraud (Ct. 1), twelve counts of aiding and abetting the commission of mail fraud (Cts. 2-13), and one count of removal or destruction of property to prevent seizure (Ct. 14).

The government alleged that from January, 1986 through approximately July, 1989, the period covered by Count 1 of the indictment, Defendant Latham owned six retail grocery stores in the Tulsa, Oklahoma area which granted discounts to retail purchasers upon the submission of a proper coupon at the time of sale.

The government alleged that during this period the defendants, including Brewer and Honel, conspired to commit, or did commit, mail fraud through a scheme to defraud various manufacturers by "misredeeming" or "malredeeming" coupons various manufacturers offered to induce consumers to purchase their products. The government alleged that the defendants accomplished this in two ways; first, by purchasing large quantities of the Sunday edition of the *Tulsa World* newspaper and removing manufacturers' coupons from those papers and, second, by removing manufacturers' coupons attached to products on sale in the stores and from advertising displays in the stores. The government alleged that the defendants would then take the coupons and mix them with "legitimately" received coupons from customers who purchased products from Defendant Latham's stores. The defendants would then allegedly submit the mix of "legitimate" coupons and misredeemed or malredeemed coupons to a clearing house which, acting on behalf of the manufacturers, paid Defendant Latham's stores for the coupons submitted.

The government further alleged that the defendants altered store records to reflect an increase in the amount of coupons the stores received from customers who purchased products.

On October 24, 1990, in return for the government's agreement to dismiss Counts 2 through 14, Brewer and Honel entered pleas of guilty to Count 1. In their petitions for plea, Brewer and Honel specifically denied that they had any responsibility for, or any part in, preparing, organizing, packaging, transporting, shipping or delivering the coupons to the clearing houses or to the manufacturers or that they had any responsibility for dealing with the clearing houses or the manufacturers, the actions the government claimed caused the purported loss the victims allegedly suffered. Significantly, the government did not offer any evidence, nor even allege, that Brewer or Honel had any responsibility for these actions.

The sole evidence the government presented of the loss the victims purportedly suffered was the testimony and report of Scott Kallenberger of the United States Probation Office who conceded not only that he was not an expert in the area, but that when he began preparing the loss calculation, he had no knowledge whatsoever of the retail industry, the food industry or the coupon industry.

The loss calculation to which Kallenberger testified at the hearing on the defendants' objections was based on a coupon redemption rate Kallenberger derived from his interpretation of a report prepared by Preferred Merchant Reports ("PMR") which he received from the Coupon Information Center ("CIC") concerning coupon redemption rates for stores in Detroit, Michigan. The coupon redemption rate in the PMR study was based on PMR's interpretation of information PMR obtained from Equifax, Inc.'s reports of interviews with various merchants and the City of Detroit and PMR's application of data PMR obtained from *Progressive Grocers*, an industry trade publication, and an Ohio Grocers'

Association survey of its members in Cleveland, Ohio to the information concerning the Detroit stores.

The government's loss calculation, which the district court accepted in fashioning the restitution order, was thus based on the Probation Office's interpretation of hearsay within hearsay, predicated upon interpretations of still more hearsay. The evidence adduced at the loss hearing showed that this hearsay information did not have even a minimum indicia of reliability.

There was no evidence that any of the stores in the PMR study were comparable in size or selling area to Defendant Latham's stores. Even the government conceded that this was "an obvious flaw in this study."

The defendants also offered expert testimony that the Detroit market and stores in the PMR study were in no way comparable to Defendant Latham's stores or the Tulsa market and that the coupon redemption rate shown in the PMR study could therefore not be a valid basis to predict coupon redemption rates for Defendant Latham's stores. The government's own testimony and arguments further showed that the data in the PMR study was not from the proper time period.

In its opinion, the court of appeals stated that Brewer's and Honel's contention that the PMR study was unreliable purportedly overlooked "the fact that the private [PMR] study was used only as a starting point for determining loss," and that "[t]he reliability of the private study was verified by comparing its result to the coupon redemption rate of grocery stores in Tulsa." 983 F.2d at 185. The evidence in the record and the government's arguments on appeal showed, however, that the government's attempts to verify the coupon redemption rate in the PMR study only further proved its inaccuracy.

Kallenberger testified that in attempting to validate the redemption rate used in the government's loss calculation, he obtained business records from the new owners of two of Defendant Latham's stores. These records

revealed redemption rates of 22% and 87% higher than those Kallenberger used in the government's calculations.

The evidence further showed that all six of Defendant Latham's stores had selling areas in excess of 20,000 square feet. In attempting to develop an explanation for the fact that only 4% of the stores in the PMR study had selling areas in excess of 10,000 square feet, Kallenberger contacted David Vienna of CIC for information concerning these stores. The evidence showed that Vienna had informed Kallenberger that the redemption rate for these stores, the only ones in the PMR study that were even arguably close in size to Defendant Latham's stores, had a coupon redemption rate which was nearly 30% higher than the rate Kallenberger had used in his loss calculations.

The government also argued in its appellate brief (upon which the court of appeals presumably relied to reach its conclusion) that the "Probation Office surveyed a total of 103 large retail grocery stores located in the Tulsa area," and that "in all, a total of 103 large discount grocery stores in Oklahoma were surveyed . . .." The evidence in the record, however, showed only 51 stores in Oklahoma had been surveyed, or less than half the number the government claimed.

In attempting to explain the fluctuations in loss calculations (which varied from a low of $857,764.81 to a high of over $2.3 million), the government stated that it arrived at an amount of only $1.19 million because "only 70% of the manufacturers nationwide made restitution claims." This statement raised another fatal defect -- there is no evidence in the record from which the district court could positively identify each, or for that matter any, victim manufacturer to whom restitution was due.

In addition to questioning the reliability of the information upon which the government's loss calculation was based, Brewer and Honel also questioned the accuracy of the government's calculations. Perhaps the most glaring example involved the effect double-couponing (i.e., allowing

a customer twice the face value of the coupon), which was practiced in Defendant Latham's stores, would have on the loss calculations.

There was expert testimony at the loss hearing that double-couponing, along with other practices such as coupon swap boxes and affixing coupons to particular products within a stores, would increase the expected coupon redemption rate. The government conceded that double-couponing would increase the expected coupon rates at Defendant Latham's stores. The government, in fact, admitted that one of the sources contacted to verify the redemption rate in Kallenberger's loss calculations stated that double-couponing would increase the normally expected redemption rate by anywhere from 50% to 100%.

The court of appeals stated in its opinion that "[c]ontrary to Defendants' assertions, the district court and the probation department considered the effect of Latham's double-couponing in their loss calculations . . .." 983 F.2d at 186. There was, however, absolutely no evidence of this in the record. The only possible basis for the court of appeals' conclusion is a statement in the government's response brief that the Probation Office had purportedly informed government counsel that the PMR study upon which the government's calculations were based allegedly included retail stores which practiced double-couponing. This statement was clearly outside the appellate record and could therefore not properly be considered by the court of appeals.[1]

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[1]There are other indications that the court of appeals' review and comprehension of the appellate record and the arguments the parties raised on appeal were less than complete. For example, in its opinion, the court of appeals stated that "[d]efendants' contention that the loss estimation impermissibly relied on hearsay is equally baseless, because it is well-established that hearsay evidence is admissible at sentencing." 983 F.2d at 185-86. This statement ignores the fact that Brewer and Honel expressly recognized in both their briefs in chief and their reply briefs that the district court could consider hearsay information at the sentencing stage. Brewer's and Honel's arguments were not that the

Another example is the time period for which the government calculated the loss. The government's calculation included losses through December, 1989, even though the indictment alleged the conspiracy continued only through July, 1989.

Finally, even presuming the loss calculations the government presented were accurate and were based upon reliable information, the government offered no evidence whatsoever of how much of that loss could be attributed to the acts Brewer and Honel committed in furtherance of the conspiracy.

On appeal, Brewer and Honel contended that in light of this court's pronouncement in Hughey v. United States, 495 U.S. 411 (1990), that the language and structure of the VWPA authorized an award of restitution only for the losses caused by the specific conduct that is the basis of the offense of conviction, the district court imposed an illegal sentence by failing to limit the amount of restitution it ordered Brewer and Honel to pay to the losses caused by the specific acts Brewer and Honel performed in furtherance of the conspiracy. Brewer and Honel also argued that because the district court's restitution order was based on unreliable information and inaccurate calculations, it was an illegal sentence and deprived them of due process.

In affirming the district court's restitution order against Brewer and Honel, the court of appeals held that despite Hughey, a defendant who is convicted of conspiracy can be required to pay restitution for all losses resulting from the conspiracy regardless of whether those losses resulted

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district court could not consider hearsay, but rather, that the district court could only consider reliable hearsay.

The court of appeals' judgments also ordered Brewer and Honel to surrender to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed. See Appendices C and D. The court of appeals apparently overlooked the fact that Brewer and Honel were sentenced to probation, not incarceration. See Appendices A and B.

from the acts the defendant performed in furtherance of the conspiracy. 983 F.2d at 184-85. The court of appeals also held, based at least in part on evidence that was outside the appellate record, that the government's loss calculations were accurate and were based on reliable information. 983 F.2d at 185-86.

Basis for federal jurisdiction in the court of first instance: The district court had jurisdiction pursuant to 18 U.S.C. §3231.

REASONS FOR GRANTING REVIEW

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S DECISION IN HUGHEY

In Hughey, this Court unequivocally stated:

> We hold that the language and structure of the Act [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.

495 U.S. at 413 (emphasis added). In setting out the rationale for its holding, this Court discussed the limitations in 18 U.S.C. §§ 3579 and 3580 (now 18 U.S.C. §§ 3663 and 3664) which authorize restitution:

> [T]he repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.

495 U.S. at 416 (emphasis added).

> Section 3580(a) hence confirms, rather than undermines, our conclusion that the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order.

495 U.S. at 420 (emphasis added).

This Court's plain mandate, as set forth in Hughey, is that the VWPA does not authorize a federal court to award restitution for losses which are not caused by the conduct of the defendant which form the basis of the offense of conviction. Despite this, the court of appeals held that where a defendant is convicted of conspiracy, a district court may order that defendant to make restitution for all losses caused by the entire conspiracy, not just the losses caused by the specific conduct the defendant performed in furtherance of the conspiracy. 983 F.2d at 184.

There is nothing in Hughey to indicate that this Court did not intend it to apply to conspiracies. Brewer and Honel respectfully submit that when the offense of conviction is conspiracy, Hughey limits the amount of restitution to the losses caused by the specific conduct a defendant has performed in furtherance of the conspiracy. Accord, United States v. McHenry, 974 F.2d 1031, 1034 (9th Cir. 1991).

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The court of appeals' holding in this case that when a defendant is convicted of conspiracy, the district court's restitution order may encompass all losses resulting from the conspiracy rather than just those which are caused by the acts which the defendant performed in furtherance of the conspiracy (see Brewer, 983 F.2d at 184-85), conflicts with decisions of the Sixth, Eighth, Ninth and Eleventh Circuits.

In United States v. Sharp, 941 F.2d 811 (9th Cir. 1991), the Ninth Circuit addressed the impact of Hughey on restitution orders in cases in which one of the elements of the offense was an ongoing scheme. The Ninth Circuit held that Hughey overruled United States v. Pomazi, 851 F.2d 244 (9th Cir. 1988) in which the Ninth had earlier held that where the offense of conviction involved a fraudulent scheme,

restitution could be ordered for the losses caused by the entire scheme. Sharp, 941 F.2d at 814-15. The Ninth Circuit then held that "[e]ven when the offense of conviction involves a conspiracy or scheme, restitution must be limited to the loss attributable to the specific conduct underlying the conviction." Id. at 815; see also United States v. Niven, 952 F.2d 289, 294 (9th Cir. 1991).

The Eighth Circuit similarly held in United States v. Marsh, 932 F.2d 710 (8th Cir. 1991) that because this Court included Pomazi in its reference to the split of authority, this Court intended Hughey to apply to cases like Pomazi:

> [I]n other words, Hughey applies to cases involving continuing schemes to defraud. Therefore, even in an ongoing, unitary scheme, the defendant can be held liable in restitution only for the specific acts to which he pleads or is found guilty.
>
> . . .
>
> In terms of ordering restitution, it is irrelevant whether the crime charged is one requiring an underlying scheme or one that does not require such a showing. In either case, restitution is limited to the specific conduct underlying the convictions.

Id. at 712-13; see United States v. Milbourn, 948 F.2d 1088, 1089 (8th Cir. 1991).

In United States v. Stone, 948 F.2d 700 (11th Cir. 1991), a mail fraud case, the Eleventh Circuit rejected the government's argument that because a fraudulent scheme is an element of the offense, restitution may include all losses from the entire scheme:

> Consistent with the Supreme Court's decision in Hughey, we hold that a restitution order under the VWPA may not exceed the loss

> attributable to the specific conduct that is the basis of the offense of conviction.

Id. at 704.

In United States v. Streebing, __ F.2d __, 1993 U.S. App. Lexis 3303, slip op. (6th Cir., Mar. 2, 1993), and United States v. Jewett, 978 F.2d 248 (6th Cir. 1992), the Sixth Circuit rejected this same argument from the government and held that the existence of a scheme did alter the limitations the VWPA imposed by the VWPA:

> The district court, in ordering restitution based on all losses caused by defendant Jewett's scheme to defraud rather than those attributable to the specific mailings for which Jewett was charged and convicted in Counts I and II, exceeded its statutory authority under 18 U.S.C. § 3663(a)(1).

Jewett, 978 F.2d at 252; see Streebing, slip op. at 6-9; see also United States v. Gravatt, 1991 U.S. App. Lexis 30671, slip op. at 4-6 (6th Cir., Dec. 27, 1991).[2]

In United States v. McHenry, 974 F.2d 1031 (9th Cir. 1991), the Ninth Circuit applied Hughey to a restitution order

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[2]In both Streebing and Jewett, the Sixth Circuit noted that the amendment to the VWPA which became effective November 29, 1990, was "a change in the law" which "supersed[ed] the Supreme Court's decision in Hughey" and the district court's authority to order restitution for offenses involving a scheme, conspiracy or pattern of criminal activity. Streebing, slip op. at 9-10; Jewett, 978 F.2d at 252-53. In both cases, however, the Sixth Circuit held the constitutional prohibition against ex post facto laws precluded this expansion in the scope of restitution from being applied retroactively to offenses which, like Brewer's and Honel's conspiracy conviction here, were committed before the effective date of the amendment. Streebing, slip op. at 9-10; Jewett, 978 F.2d at 252-53; accord, United States v. Seligsohn, 981 F.2d 1418, 1421-22 (3d Cir. 1992).

in a case in which the defendants were convicted of conspiracy:

> When the act in furtherance of the conspiracy does not deprive anyone of anything of value, however, the conduct forming the basis of a conspiracy conviction does not cause any discernible loss.

Id. at 1033. The Ninth Circuit then went on to state:

> Hughey requires that restitution must be limited to the loss flowing from the conspiracy itself. Therefore, to remain within these boundaries, the loss must result from the act or acts done in furtherance of the conspiracy . . ..

Id. at 1034 (emphasis added).

In addition to the decision from the Tenth Circuit here, there are also decisions from the First, Fifth and Seventh Circuits which are in conflict with the above-cited decisions from the Sixth, Eighth, Ninth and Eleventh Circuits. The First Circuit, in United States v. Wallen, 953 F.2d 3, 6 (1st Cir. 1991); the Fifth Circuit, in United States v. Chaney, 964 F.2d 437, 452-53 (5th Cir. 1992), and United States v. All Star Industries, 962 F.2d 465, 478 (5th Cir.), cert. denied, _ U.S. _, 113 S.Ct. 377 (1992); and the Seventh Circuit, in United States v. Brothers, 955 F.2d 493, 496-97 (7th Cir.), cert. denied, _ U.S. _, 113 S.Ct. 142 (1992), and United States v. Bennett, 943 F.2d 738, 741 (7th Cir. 1991), cert. denied, _ U.S. _, 112 S.Ct. 2970 (1992), have held that when the offense of conviction involves a scheme or conspiracy, a restitution order need not be limited to losses caused the specific conduct underlying the offenses of conviction.

Brewer and Honel respectfully submit that certiorari is necessary to remedy the conflict between the decisions of

the Sixth, Eighth, Ninth and Eleventh Circuits and the decisions of the First, Fifth, Seventh and Tenth Circuits.

III. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

While it is true, as the court of appeals stated, that a district court may consider hearsay at the sentencing stage, due process still requires that the district court consider only reliable hearsay. United States v. Goldfaden, 959 F.2d 1324, 1330 (5th Cir. 1992); United States v. Rodriguez-Luna, 937 F.2d 1208, 1212 n.4 (7th Cir. 1991); United States v. Manuel, 912 F.2d 204, 208 (8th Cir. 1990); United States v. Robinson, 898 F.2d 1111, 1115-16 (6th Cir. 1990); United States v. Giltner, 889 F.2d 1004, 1007 (11th Cir. 1989). The Tenth Circuit itself is in accord with this rule. E.g., United States v. Johnson, 911 F.2d 1394, 1402 (10th Cir. 1990), cert. denied, U.S. _, 111 S.Ct. 761 (1991); United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir.), cert. denied, 497 U.S. 1038 (1990); United States v. Sunrhodes, 831 F.2d 1537, 1554 (10th Cir. 1987).

Despite this, the district court considered, and based its restitution order on, the PMR study which was unquestionably hearsay and, as shown by the testimony of the defendants' expert and the government's own testimony and argument, was unreliable. The court of appeals sanctioned the district court's actions by affirming the restitution order against Brewer and Honel.

The due process clause of the United States Constitution and the VWPA also require that restitution orders be made by accurate computation based on accurate

information. E.g., United States v. Joseph, 914 F.2d 780, 785 (6th Cir. 1990); United States v. Mischler, 787 F.2d 240, 247 (7th Cir. 1986); United States v. Forzese, 756 F.2d 217, 222 (1st Cir. 1985). In order to comply with these requirements, the district court must be able to identify the victims. United States v. Casamento, 887 F.2d 1141, 1178 (2d Cir. 1989), cert. denied, 493 U.S. 1087 (1990); United States v. Barany, 884 F.2d 1255, 1260 (9th Cir. 1989), cert. denied, 493 U.S. 1034 (1990); United States v. Angelica, 859 F.2d 1390, 1395 (9th Cir. 1988); United States v. Pomazi, 851 F.2d 244, 250 (9th cir. 1988). Again, the Tenth Circuit is in accord. United States v. Duncan, 870 F.2d 1532, 1536, 1539 (10th Cir.), cert. denied, 493 U.S. 906 (1989); United States v. Watchman, 749 F.2d 616, 619 (10th Cir. 1984).

As the record plainly showed, the district court relied upon inaccurate calculations based upon inaccurate and unreliable information in fashioning its restitution order against Brewer and Honel. There was also no evidence of the identity of any of the victim manufacturers. Despite this, the court of appeals sanctioned the district court's actions by affirming the restitution order against Brewer and Honel.

Finally, in attempting to justify its actions and find that the calculations upon which the district court based its restitution order were reliable, the court of appeals relied upon statements in the government's brief. See Brewer, 983 F.2d at 186. The statements in the government's brief were unquestionably outside the appellate record and it was clearly improper for the court of appeals to consider them. See Fed. R. App. P. 10(a); Kirshner v. Uniden Corp., 842 F.2d 1074, 1077 (9th Cir. 1988); Hill v. Trustees of Indiana University, 537 F.2d 248, 251 (7th Cir. 1976); Tanner v. United States, 401 F.2d 281, 288 (8th Cir. 1968), cert. denied, 393 U.S. 1109 (1969).

Brewer and Honel submit that the district court, by basing its restitution order against them on inaccurate calculations and inaccurate and unreliable information, and the court of appeals, by not only sanctioning the district

court's actions, but relying on matters outside the appellate record to do so, have so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is called for.

CONCLUSION

Petitioners Walter E. Brewer and Brian E. Honel respectfully request that this Court grant their Petition for Writ of Certiorari and review the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

By: _____

Graydon D. Luthey
Frank M. Hagedorn
James J. Proszek
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
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(918) 588-2700

Attorneys for Petitioners
Walter E. Brewer and Brian E. Hinel

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Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

United States of America,	)	Judgement in a Criminal Case
	)	(For Offenses Committed On
Plaintiff,	)	or After November 1, 1987)
	)	
v.	)	Case No. 90-CR-087-007-E
	)	
WALTER E. BREWER,	)	
	)	Frank Hagedorn
Defendant.	)	Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(sX) One of the Indictment.

was found guilty on count(s) ---- after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18:371	Conspiracy	July, 1989	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

X Count(s) Two thru Fourteen of the Indictment are *dismissed on the motion of the United States.*

X It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count One of the Indictment , which shall be due X immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
444-60-3616

Defendant's Date of Birth: February 11, 1992
04-07-56 Date of Imposition of Sentence

Defendant's Mailing Address:
7412 East 22nd Place
Tulsa, Oklahoma 74129 Signature of Judicial Officer

James O. Ellison,
Defendant's Residence Chief U.S. District Judge
Address: Name & Title of Judicial Officer
7412 East 22nd Place
Tulsa, Oklahoma 74129 Date

PROBATION

The defendant is hereby placed on probation for a term of five (5) years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

The defendant shall pay restitution as noted on page 3 of this judgment.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month:

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall submit to urinalysis as directed by the U.S. Probation Office;

15) the defendant shall not possess a firearm or other dangerous weapon without the permission of the U.S. Probation Office.

RESTITUTION AND FORFEITURE

RESTITUTION

X The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
NCH Promotional Services 75 - Tri-State International, Suite 400 Lincolnshire, IL 60060-4443	$118,378
Coupon Information Center 400 Wythe Street, Suite 2-A Alexandria, VA 23314	$ 36,719
Carolina Manufacturers Services, Inc. 150 S. Stratford Road, Suite 500 Winston-Salem, NC 27104	$ 19,903
TOTAL RESTITUTION	$175,000

Payments of restitution are to made to:

X the United States Attorney for transfer to the payee(s).

the payee(s).

Restitution shall be paid:

X in full immediately.

in full not later than _____.

in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

X in installments according to the following schedule of payments:

Any amount not paid immediately shall be payable as a condition of probation, and paid at the discretion of the U.S. Probation Office.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court finds that the defendant did not obstruct justice in relation to the instant offense, and accordingly, shall receive credit for acceptance of responsibility.

Guideline Range Determined by the Court:

Total Offense Level: 15

Criminal History Category: I

Imprisonment Range: 18 to 24 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 4,000 to $ 3,897,378

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 1,191,382

X Full restitution is not ordered for the following reason(s):

The Court allocated the remaining restitution balance among five codefendants in the instant offense.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

X upon motion of the government, as a result of defendant's substantial assistance

for the following reason(s):

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

United States of America,	)	Judgement in a Criminal Case
	)	(For Offenses Committed On
Plaintiff,	)	or After November 1, 1987)
	)	
v.	)	Case No. 90-CR-087-004-E
	)	
Brian E. Honel,	)	
	)	Larry Gullekson
Defendant.	)	Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(sX) One of the Indictment.

was found guilty on count(s) ---- after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18:371	Conspiracy	July, 1989	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

X Count(s) Two thru Fourteen of the Indictment are dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count One of the Indictment , which shall be due X immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
445-66-1930

Defendant's Date of Birth:
02-24-59

February 11, 1992
Date of Imposition of Sentence

Defendant's Mailing Address:
1224 S. Walnut
Broken Arrow, OK 74012

Signature of Judicial Officer

James O. Ellison,
Chief U.S. District Judge
Name & Title of Judicial Officer

Defendant's Residence Address:
1224 S. Walnut
Broken Arrow, OK 74012

Date

PROBATION

The defendant is hereby placed on probation for a term of five (5) years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

The defendant shall pay restitution as noted on page 3 of this judgment.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month:

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall submit to urinalysis as directed by the U.S. Probation Office;

15) the defendant shall not possess a firearm or other dangerous weapon without the permission of the U.S. Probation Office.

RESTITUTION AND FORFEITURE

RESTITUTION

X The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
NCH Promotional Services 75 - Tri-State International, Suite 400 Lincolnshire, IL 60060-4443	$118,378
Coupon Information Center 400 Wythe Street, Suite 2-A Alexandria, VA 23314	$ 36,719
Carolina Manufacturers Services, Inc. 150 S. Stratford Road, Suite 500 Winston-Salem, NC 27104	$ 19,903
TOTAL RESTITUTION	$175,000

Payments of restitution are to made to:

X the United States Attorney for transfer to the payee(s).

the payee(s).

Restitution shall be paid:

X in full immediately.

in full not later than _____.

in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

X in installments according to the following schedule of payments:

Any amount not paid immediately shall be payable as a condition of probation, and paid at the discretion of the U.S. Probation Office.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court finds that the defendant did not obstruct justice in relation to the instant offense, and accordingly, shall receive credit for acceptance of responsibility.

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 3,897,378

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 1,191,382

X Full restitution is not ordered for the following reason(s):

The Court allocated the remaining restitution balance among five codefendants in the instant offense.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

X upon motion of the government, as a result of defendant's substantial assistance

for the following reason(s):

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 92-5038
	)	90-CR-87-E
WALTER E. BREWER,	)	
	)	
Defendant-Appellant.	)	

JUDGMENT
Entered January 5, 1993

Before McKAY, Chief Judge, LAY*, and BALDOCK, Circuit Judges.

---

*The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was submitted on the briefs by the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

It is the further order of this court that Walter E. Brewer, appellant, shall, within thirty (30) days from and after the date of the filing of the mandate of this court in the district court, district court, surrender to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed.

The district court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

Entered for the Court

ROBERT L. HOECKER, Clerk

By:

Patrick Fisher, Chief Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 92-5043
	)	90-CR-87-E
Brian Honel,	)	
	)	
Defendant-Appellant.	)	

JUDGMENT
Entered January 5, 1993

Before McKAY, Chief Judge, LAY*, and BALDOCK, Circuit Judges.

---

*The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was submitted on the briefs by the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

It is the further order of this court that Walter E. Brewer, appellant, shall, within thirty (30) days from and after the date of the filing of the mandate of this court in the district court, district court, surrender to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed.

The district court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: _____

Patrick Fisher, Chief Deputy Clerk

Appendix E

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Nos. 92-5038
	)	92-5043
WALTER E. BREWER and	)	
BRIAN E. HONEL,	)	
	)	
Defendant-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. Nos. 90-CR-87-E, 90-CR-87-4-E)

Submitted on the briefs:

Frank M. Hagedorn and James J. Proszek, Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, Oklahoma for Defendant-Appellants.

Tony M. Graham, United States Attorney, Susan M. Pennington, Assistant United States Attorney, Kathleen Bliss Adams, Assistant United States Attorney, Tulsa, Oklahoma for Plaintiff-Appellee.

Before MCKAY, Chief Judge, BALDOCK and LAY*, Circuit Judges.

BALDOCK, Circuit Judge.

In these consolidated cases, Defendants Walter E. Brewer and Brian E. Honel appeal the district court's order of restitution following Defendants' guilty plea to conspiracy to commit mail fraud. Defendants contend that the district court erred in ordering them to pay restitution for losses not caused by their specific conduct. Defendants further contend that the district court used unreliable information to calculate the total loss, making its finding of loss clearly erroneous. We have jurisdiction under 18 U.S.C. § 3742(a), and we affirm.

Defendants managed discount grocery stores in Tulsa, Oklahoma, which were owned by Fred Latham. Like most grocery stores, Latham's stores received a significant number of coupons each day. Generally, when a customer presents a product's coupon, the grocer discounts the product depicted on that coupon in the amount of the coupon's face value. To redeem these coupons, the grocer mails them to a clearing house, and the clearing house mails the grocer a check in the amount of the face value of all coupons received. Individual manufacturers then reimburse the clearing house for the amount the clearing house has paid grocers for the manufacturer's coupons. For coupons to be legally redeemed, the grocer must have received them from

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*The Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

customers in exchange for a product discount. Latham, however, illegally redeemed coupons in that he collected money from clearing houses for coupons not received from customers.

Defendants, under Latham's direction, collected coupons from newspapers and store displays and defaced the coupons, by walking on them, wrinkling them up, and sometimes watering them down, to make them appear used. Latham would then mix these coupons with coupons legitimately received from customers and send them by mail to a clearing house for redemption, falsely representing that all the coupons were legitimately received from customers. Defendants altered store records to make it appear as if the illegally redeemed coupons had been legitimately received from customers in the ordinary course of business.

Defendants were indicted, along with Latham and several others, on one count of conspiracy to commit mail fraud (count 1), twelve counts of aiding and abetting the commission of mail fraud (counts 2-13), and one count of removal or destruction of property to prevent seizure (count 14). In return for the government's agreement to dismiss Counts 2 through 14, Defendants pleaded guilty to the conspiracy count (count 1).

Because legally redeemed coupons were submitted to clearing houses with illegally redeemed coupons, the district court was unable to determine the exact amount of loss caused by the fraud. Therefore, the court was required to estimate the loss in order to determine Defendants' restitution obligations. In estimating the loss, the district court relied on a report prepared by the probation department. The report was partially based on a private research study, which interviewed 981 stores in Detroit, Michigan to determine their coupon redemption rates. The probation department then compared this private study coupon redemption rate with the coupon redemption rate in selected Tulsa grocery stores, including stores previously owned by Latham, and determined that the private study rate accurately reflected the

coupon redemption rate of Tulsa grocery stores. The district court used this coupon redemption rate to approximate the value of those coupons legitimately received from Latham's customers and subtracted this amount from Latham's total coupon redemptions to determine the amount of loss to manufacturers. The district court then reduced the loss amount, adjusting for margin of error and taking into account the discount nature of Latham's stores. The district court determined that the total loss for which all the coconspirators would be obligated to pay restitution was $1,191,382.00. The district court ordered each Defendant to pay $175,000 restitution, in addition to ordering sentences of five years probation.

Defendants first contend that the district court erred in ordering them to pay restitution for losses not caused by their specific conduct. Defendants' failure to raise this issue at sentencing limits our review to a search for plain error. United States v. Wainwright, 938 F.2d 1096, 1098 (10th Cir. 1991). Under the plain error standard, we will not review a district court's factual findings relating to sentencing, United States v. Saucedo, 950 F.2d 1508, 1518 (10th Cir. 1991), but will review for "particularly egregious" or "obvious and substantial" legal error, which our failure to consider would result in a "miscarriage of justice." Id. at 1511, 1516-17. See also United States v. Young, 470 U.S. 1, 15 (1985).

A restitution award under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3663-3664,[2] is authorized only for losses caused by conduct underlying

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[2]In the present case, the district court did not specify whether it was ordering restitution pursuant to the VWPA or the Federal Probation Act (FPA), 18 U.S.C. 3651 (repealed). Although the FPA was repealed on November 1, 1987, it is possible that the district court applied the FPA to determine Defendants' restitution obligations because Defendants' illegal conduct began in 1985, prior to the FPA's repeal. However, when a district court fails to specify whether the FPA or VWPA governs, "unless a clear intention appears to the contrary, we will assume restitution orders are made pursuant to the broader provisions of the VWPA." United States v. Cook, 952 F.2d 1262, 1264 (10th Cir. 1991).

the offense of conviction. Hughey v. United States, 495 U.S. 411, 420 (1990); United States v. Cook, 952 F.2d 1262, 1265 (10th Cir. 1991). In Hughey, the defendant was indicted for three counts of theft by a United States Postal Service employee and three counts of unauthorized credit card use. The defendant pleaded guilty to one count of unauthorized credit card use in exchange for the government dismissing the remaining charges. Id. at 413. The Supreme Court held that the defendant could be ordered to pay restitution only for the amount of loss resulting from the credit card count to which he pleaded guilty. Id. at 422. See also Cook, 952 F.2d at 1263-65 (defendant, who pleaded guilty to three counts of a forty-three count indictment charging embezzlement of social security benefits, could not be charged restitution in any amount greater than the three social security checks underlying her three counts of conviction).

Defendants contend that Hughey limits their restitution obligation to losses caused by the specific conduct they contributed to the conspiracy. According to Defendants, the loss to manufacturers was caused solely by those conspirators who actually mailed the coupons to the clearing house, and not by Defendants whose only acts contributing to the conspiracy were coupon accumulation and store record alteration. Therefore, Defendants contend that they cannot be held accountable for any restitution.[3]

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[3]The government relies on United States v. Chaney, 964 F.2d 437, 453 (5th Cir. 1992), to rebut this argument. However, Chaney is distinguishable from Defendants' case. In Chaney, the Fifth Circuit held that defendant was required to pay restitution because defendant's actions underlying her conspiracy conviction were inextricably related to those losses suffered as a result of the conspiracy conviction of which she was acquitted. The defendant in Chaney was convicted of conspiracy to make false entries in bank books and argued on appeal that because her false entries did not cause the loss underlying her conspiracy conviction, restitution was not appropriate. Id. at 443, 451. She asserted that the loss was caused by making improper loans, acts which she did not perform and which did not form the basis of her conviction. Id. at 451 n.41. Chaney is not instructive here because the defendant in Chaney was

Defendants' construction of Hughey is not persuasive. Hughey stands solely for the proposition that restitution is limited to losses caused by the conduct underlying the offense of conviction. Here, the offense of conviction was a conspiracy and the underlying conduct was Defendants' agreement to participate in the plan to defraud manufacturers with illegally redeemed coupons. When a defendant is convicted of conspiracy, a district court's restitution award may encompass all losses resulting from the conspiracy.[4] See United States v. Sanga, 967 F.2d 1332, 1335 (11th Cir. 1992) (holding that defendant can be ordered to pay restitution for losses which were the direct consequence of defendant's conspiracy because the losses flow from the conspiracy itself); United States v. Clark, 957 F.2d 248, 253 (6th Cir. 1992) (implying that if defendant had been convicted of conspiracy to commit all counts charged in the indictment, the district court could have ordered him to pay restitution for all counts charged in the indictment).

A conspiracy participant is legally liable for all reasonably foreseeable acts of his or her coconspirators in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United States v. Kissel, 218 U.S. 601, 608 (1910); United States v. Russell, 963 F.2d 1320, 1322 (10th Cir.), cert. denied 113 S. Ct. 280 (1992). Because a conspiracy participant is obligated for the acts of

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claiming that her underlying offense of conviction (making false entries) did not cause the loss, whereas Defendants in this case do not dispute that the offense underlying their conspiracy conviction (mail fraud) caused the loss. Defendants claim that the conduct that they contributed to the mail fraud conspiracy, coupon accumulation and record alteration, did not cause the loss.

[4]We do not suggest that our holding today reinstates the holding in United States v. Vance, 868 F.2d 1167 (10th Cir. 1989), which we have stated "no longer controls restitution orders under the FPA." Cook, 952 F.2d at 1264 n.3. Vance held that a district court's restitution award may encompass all losses related to a conspiracy when the original indictment charged a conspiracy, even though the defendant was not convicted of that conspiracy. Vance 868 F.2d at 1170.

his or her coconspirators until the conspiracy accomplishes its goals or that conspirator withdraws, see Hyde v. United States, 225 U.S. 347, 369 (1912), the losses caused by the entire conspiracy, not just the losses caused by those acts committed by the defendant, can be attributed to the defendant when the district court orders restitution. Cf. United States v. Wallen, 953 F.2d 3, 6 (1st Cir. 1991) (holding that RICO conviction is conviction for single offense and district court can award restitution for all losses arising from the offense and its component parts). Accordingly, the fact that Defendants did not personally mail the coupons to the redemption center does not preclude the district court from requiring them to pay restitution for losses caused by the mail fraud conspiracy in which they participated.[5] Contrary to Defendants' assertions, by

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[5]Defendants' reliance on United States v. McHenry, 952 F.2d 328 (9th Cir. 1991), is misplaced. McHenry held that conspiracy convictions are not appropriate for restitution when the overt act or acts done in furtherance of the conspiracy do not "deprive anyone of anything of value." Id. at 330. McHenry is inapposite to the present case because a loss did result from the conspiracy's overt acts in that money was fraudulently obtained from product manufacturers by illegal coupon redemption.

Defendants also cite a number of mail and wire fraud cases in which other circuits have held that when a defendant is indicted for multiple related schemes to defraud but not convicted of all, the district court cannot order restitution for losses caused by the related schemes but can only order restitution for losses caused by the count of conviction. See United States v. Niven, 952 F.2d 289, 294 (9th Cir. 1991); United States v. Milbourn, 948 F.2d 1088, 1089 (8th Cir. 1991); United States v. Stone, 948 F.2d 700, 703-04 (11th Cir. 1991); United States v. Sharp, 941 F.2d 811, 814-15 (9th Cir. 1991); United States v. Marsh, 932 F.2d 710, 712-13 (8th Cir. 1991). These cases stand solely for the proposition that a defendant cannot be ordered to pay restitution for losses caused by conduct underlying counts for which the defendant was not convicted. These cases do not support Defendants' argument here because the loss in the present case resulted from the conspiracy in which Defendants participated and were convicted.

participating in the conspiracy, Defendants' actions caused the loss.

Defendants next contend that the district court failed to base its loss calculation on reliable statistical data, making the calculation clearly erroneous, arbitrary, and unsupported by the record. In reviewing the district court's restitution award, we are "obligated to 'give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.'" United States v. Teehee, 893 F.2d 271, 274 (10th Cir. 1990) (quoting 18 U.S.C. 3742(e)). The government bears the burden of demonstrating by a preponderance of the evidence the amount of loss sustained by the victim as a result of the offense. 18 U.S.C. § 3664(d); Teehee, 893 F.2d at 275.

"The determination of an appropriate restitution amount is by nature an inexact science." Id. "[W]here the precise amount [of restitution] owed is difficult to determine, [18 U.S.C. 3664] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Admin. News 2515, 2537. Defendants' contention that the private study concerning the coupon redemption rate was unreliable overlooks the fact that the private study was used only as a starting point for determining loss. The reliability of the private study was verified by comparing its result to the coupon redemption rate of grocery stores in Tulsa. Defendants' contention that the loss estimation impermissibly relied on hearsay is equally baseless, because it is well-established that hearsay evidence is admissible at sentencing. See United States v. Beaulieu, 893 F.2d 1177, 1180 (10th Cir.), cert. denied, 110 S. Ct. 3302 (1990). Furthermore, Defendants' assertion, that the probation

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department's calculations applying the private study to Latham's stores were flawed, is also meritless. Contrary to Defendants' assertions, the district court and the probation department considered the effect of Latham's double-couponing in their loss calculations, and, although Defendants assert that the adjustments made to the loss amount showed its speculative nature, Defendants fail to observe that the majority of the adjustments were in their favor. The district court's findings of fact relating to the loss were not clearly erroneous.

AFFIRMED.

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